APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 189, Docket 71-1724

(Argued September 17, 1971 Decided October 1, 1971.)

ERNEST DACOSTA,

Plaintiff-Appellant,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, *et al.*,

Defendants-Appellees.

Before:

KAUFMAN, ANDERSON and FEINBERG,

Circuit Judges.

PER CURIAM:

The plaintiff-appellant was drafted into the U. S. Army on December 3, 1970 for a two year period of service. After completing infantry training, he received orders to report for assignment to Vietnam. On July 23, 1971, he brought this action in the district court to prevent the defendants from enforcing the orders on the ground that they lacked authority to issue them. The plaintiff claimed

that because Congress had never declared war against North Vietnam, the defendants' actions were in disregard of the Constitution. The district court granted the defendants' motion for summary judgment on the authority of this court's decision in Orlando v. Laird, 443 F.2d 1039 (2 Cir. 1971). It is our opinion that this case is governed by *Orlando*, and we affirm the judgment of the district court.

The appellant argues that the repeal by Congress of the Gulf of Tonkin Resolution removed one of the two vital supports which, he asserts, this court considered to be essential prerequisites to its conclusion in *Orlando* that there was legislative conduct equivalent to a declaration of war—the other support was a series of appropriations and Selective Service Acts for the Vietnam conflict. This is, however, a misconstruction of the *Orlando* decision. We said:

> "Putting aside for a moment the explicit authorization of the Tonkin Gulf Resolution, we disagree with appellants' interpretation of the declaration clause for neither the language nor the purpose underlying that provision prohibits an inference of the fact of authorization from such legislative action as we have in this instance. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia." 443 F.2d at 1043.

In other words, there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval opera-

tions in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution. That resolution came at a time when a police action was being escalated into a large scale conflict and was a clear expression of congressional intent to support the Executive's move in that direction. Its repeal did not wipe out its history nor could it have the effect of a *nunc pro tunc* action. The Conference Committee recommending the repeal amendment in 1970, which was passed, expressed the reason for it as follows: "Recent legislation and Executive statements make the 1964 resolution unnecessary for the prosecution of U. S. foreign policy." Cong. Rep. No. 1805, 91st Cong., 2nd Sess., U.S. Code Cong. & Ad.News, p. 6069 (1970). It was not the intent of Congress in passing the repeal amendment to bring all military operations in Vietnam to an abrupt halt. The Executive was then endeavoring to unwind the conflict as rapidly as it was feasible to do so. It has steadily pursued that objective up to the present time and has declared it to be its intention to continue the withdrawals of combat forces. If the Executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the Legislative Branch over what is presently afforded, might well be required. But that is not the case before us.

If the mutual action by the Legislative and Executive branches and the particular means of collaboration they adopted to escalate a police action into large scale military operations are not a violation of the Constitution, as we held in *Orlando*, it can hardly be said that the combined efforts of the same two branches to achieve an orderly deceleration and termination of the conflict are. The Congress has continued to support the steps taken by the Executive in this regard. Although a number of senators

and representatives have strongly and sincerely urged a speedier winding down of the armed strife and have sought to bring this about by introducing amendments to the draft extension bill to prevent the use of funds for the deployment or maintenance of United States Armed Forces in Indochina after specified dates, these amendments were defeated in the Senate on June 16, 1971 by votes of 52–44 (Chiles Amendment) and 55–42 (McGovern-Hatfield Amendment), 117 Cong.Rec.S. 9275, 9279 (daily ed. June 16, 1971), and in the House on June 17, 1971 by a vote of 237–147, 117 Cong.Rec.H. 5410 (daily ed. June 17, 1971).[1] On September 21, 1971, the Senate approved the House Bill extending the Selective Service Act through June 30, 1973, Pub.L. No. 92–129 (Sept. 28, 1971) (H.R. 6531, 92nd Cong. 1st Sess.). The Bill, as enacted, did not quarrel with the fact that troops were in Indochina but simply stated that it was the sense of Congress that there be a prompt and orderly withdrawal of United States forces from that area.

The remaining points raised by the appellant do not have sufficient merit to call for discussion. It may be said, however, that appellant's claim that the so-called "Pentagon Papers" revealed that there was in fact no mutual participation between Congress and the Executive as stated in the *Orlando* decision is not properly before us. The "Pentagon Papers" were not a part of the record in this

[1] The appellant argues that there was widespread congressional criticism of the *Orlando* court's interpretation of the meaning of congressional action on military spending and draft extension bills. In light of this argument, it is interesting to note that the House defeated the McGovern-Hatfield Amendment knowing full well exactly how such a defeat would be interpreted. Just prior to the vote, Congressman Pepper, citing *Orlando*, told the House that if it did not approve the amendment it would be voting for a declaration of war in Indochina, 117 Cong.Rec.H. 5409 (daily ed. June 17, 1971).

case, nor was there evidentiary material in support of their authenticity.

As the constitutional propriety of the means by which the Executive and the Legislative branches engaged in mutual participation in prosecuting the military operations in Southeast Asia, is, as we held in *Orlando*, a political question, so the constitutional propriety of the method and means by which they mutually participate in winding down the conflict and disengaging the nation from it, is also a political question and outside of the power and competency of the judiciary.

The judgment of the district court is affirmed.

Judgment

UNITED STATES DISTRICT COURT

Eastern District of New York

71-C-550

Ernest Dacosta,

Plaintiff,

—against—

Melvin Laird, individually, and as Secretary of Defense of the United States; and Robert Froehlke, individually, and as Secretary of the Army of the United States; General Jonas D. Platt, Chief of Staff, United States Army Infantry Training Center, Fort Polk, Louisiana,

Defendants.

An order of the Honorable John F. Dooling, Jr., United States District Judge, having been filed on July 27, 1971, granting defendants' motion for summary judgment; and denying plaintiff's cross-motion for summary judgment; and directing the Clerk to enter judgment that plaintiff take nothing and that the action be dismissed on the merits,

It is ordered and adjudged that defendants' motion for summary judgment is granted; and that plaintiff's motion for summary judgment be denied; and that plaintiff take nothing and that the action be dismissed on the merits.

Dated: Brooklyn, N.Y.
July 28, 1971

Lewis Orgel,
Clerk

APPENDIX B

Constitutional and Statutory Provisions Involved

Constitution.

Article I. Section 8

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .

To define and punish . . . Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, ... over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards, and other needful Buildings;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 1

The executive Power shall be vested in a President of the United States of America. . . .

Article II, Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States; . . .

Statutes

Gulf of Tonkin Resolution ("Joint Resolution to promote the maintenance of international peace and security in Southeast Asia," P.L. 88-408, 78 Stat. 384, August 10, 1964):

Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the peoples of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Foreign Military Sales Act (P.L. 91-672, 84 Stat. 2053, January 12, 1971)

Sec. 12. The joint resolution entitled "Joint resolution to promote the maintenance of international peace and security in Southeast Asia," approved August 10, 1964 . . . is terminated effective upon the day that the Second session of the Ninety-first Congress is last adjourned.

Defense Supplemental Appropriations Act, 1965 (P.L. 89-18, 79 Stat. 109, May 7, 1965)

For transfer by the Secretary of Defense, upon determination by the President that such action is necessary in connection with military activities in southeast Asia, to any appropriation available to the Department of Defense for military functions, to be merged with and to be available for the same purposes and for the same time period as the appropriation to which transferred, $700,000,000, to remain available until expended.

Supplemental Defense Authorization Act, 1966 (P.L. 89-367, 80 Stat. 36, March 16, 1966)

Sec. 401. (a) Funds authorized for appropriation for the use of the Armed Forces of the United States under this or any other Act are authorized to be made avail-

able for their stated purposes in connection with support of Vietnamese and other free world forces in Vietnam, and related costs, during the fiscal years 1966 and 1967, on such terms and conditions as the Secretary of Defense may determine.

Armed Forces Supplemental Authorization Act, 1967 (P.L. 90-5, 81 Stat. 5, March 16, 1967)

Sec. 401. The Congress hereby declares—

(1) its firm intentions to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam;

(2) its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of this country, and allow the people of South Vietnam to determine the affairs of the nation in their own way; and

(3) its support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion.

Draft Extension Act of 1971, Title IV
(P.L. 92-129, 85 Stat. 361, September 28, 1971).

SEC. 401. It is hereby declared to be the sense of Congress that the United States terminate at the earliest practicable date all military operations of the United States in Indochina, and provide for the prompt and orderly withdrawal of all United States military forces at a date certain subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government, and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above expressed policy by initiating immediately the following actions:

(1) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(2) Negotiate with the Government of North Vietnam for the establishing of a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release at a date certain of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina subject to a corresponding series of phased releases of American

prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established pursuant to paragraph (2) hereof.

Military Procurement Authorization Act for 1972, Title VI
(P.L. 92-156, 85 Stat. 430, November 17, 1971)

SEC. 601. (a) It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above-expressed policy by initiating immediately the following actions:

(1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.

(2) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established by the President pursuant to paragraph (1) hereof or by such earlier date as may be agreed upon by the negotiating parties.